

05 CA 3076  
No. 16050 ✓

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United States  
Court of Appeals  
for the Ninth Circuit

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McNEIL CONSTRUCTION COMPANY, a Corporation,

Appellant,

vs.

THE LIVINGSTON STATE BANK, a Corporation,

Appellee.

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Transcript of Record

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Appeal from the United States District Court  
for the District of Montana.

FILED

AUG - 4 1958

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

BROWN, SANDE, SYMMES AND FORBES,  
Suite 200, First National Bank Building,  
Billings, Montana,

For Appellant.

LUXAN AND SCRIBNER,  
322 Fuller Avenue,  
Helena, Montana,

For Appellee.





In the United States District Court for the District  
of Montana, Billings Division

Case No. 758

McNEIL CONSTRUCTION COMPANY, a Corporation,

Plaintiff,

vs.

THE LIVINGSTON STATE BANK, a Corporation,

Defendant.

### COMPLAINT

Plaintiff above named for its complaint herein respectfully alleged as follows:

#### I.

That at all times herein mentioned the plaintiff, McNeil Construction Co., was and now is a corporation organized and existing under and by virtue of the laws of the state of California; that the defendant, Livingston State Bank, at all times herein mentioned was and now is a corporation organized and existing under and by virtue of the laws of the state of Montana; that the matter in controversy exceeds \$3,000.00, exclusive of interest and costs.

#### II.

That the defendant is a banking corporation organized and existing as aforesaid, and that it is engaged in the banking business and accepts deposits from individuals and from corporations, and

authorizes such individuals and corporations to draw checks on accounts maintained by such individuals and corporations in its aforesaid bank, which is located in the city of Livingston, Park County, Montana. [1\*]

### III.

That at all times herein mentioned the plaintiff, McNeil Construction Co. was engaged, amongst other things, in the general construction business, and during the summer and fall of 1956 was engaged in construction work in Yellowstone National Park, Wyoming; and that it maintained in the Livingston State Bank as aforesaid a bank account in excess of \$5,000.00 for the purpose, among other things, of drawing checks thereon to be issued to employees for work, labor, and services performed by employees of said McNeil Construction Co.

### IV.

That between September 13, 1956, and September 28, 1956, inclusive, the plaintiff employed one Lex Lamb as a night watchman on the project or work being done by it in Yellowstone National Park as aforesaid; and that unknown to the plaintiff and in September, 1956, said Lex Lamb stole from the plaintiff 400 blank payroll checks numbered 8401 to 8800, inclusive, from the offices maintained by the plaintiff, McNeil Construction Co. in Yellowstone National Park, Wyoming.

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\*Page numbering appearing at foot of page of original Certified Transcript of Record.

## V.

That on or about September 26, 1956, said Lex Lamb forged the plaintiff's name to 29 of the checks stolen by him as aforesaid, each in the sum of \$143.04, and he cashed the same and which checks were paid by the defendant, Livingston State Bank, in the total sum of \$4,148.16, and from funds on deposit with the Livingston State Bank, and which deposit was made by the plaintiff, McNeil Construction Co., and that said Livingston State Bank was advised of the theft of said 400 payroll checks and the forgery of 29 thereof by said Lex Lamb on or about October 26, 1956, which was within 30 days after the discovery by the plaintiff of the [2] forgery of these checks and the receipt of the plaintiff of vouchers showing said payment.

## VI.

The defendant refuses to refund to plaintiff said sum of \$4,148.16, which is due and owing to the plaintiff from the defendant.

Wherefore, plaintiff demands judgment against the defendant in the total sum of \$4,148.16 with interest thereon at the rate of 6% from the 1st day of November, 1956, together with the costs and disbursements of this action.

BROWN, SANDE, SYMMES &  
FORBES,

/s/ CHARLES B. SANDE,

/s/ WEYMOUTH D. SYMMES,

/s/ ROCKWOOD BROWN, JR.,  
Attorneys for Plaintiff.

[Endorsed]: Filed May 1, 1957. [3]

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[Title of District Court and Cause.]

### MOTION AND NOTICE

Comes now the defendant and moves the Court as follows:

1. To dismiss the action, pursuant to the provisions of Section 1406, Title 28, United States Code, on the ground that said action is filed in the wrong division, because (a) it is a civil action, not of a local nature, against a single defendant, and (b) the defendant resides and maintains its principal place of business in Park County, Montana, in the Helena Division of said Court.

2. To dismiss the action because the Complaint fails to state a claim against the defendant upon which relief can be granted.

3. In the event said action is not dismissed, to transfer said action to the Helena Division of said Court, pursuant to the provisions of Section 1406, Title 28, United States Code, on the ground that said action is filed in the wrong division because (a) it is a civil action, not of a local nature, against a single defendant, and (b) the defendant resides and maintains its principal place of business in Park County, Montana, in said Helena Division.



4. In the event said action is not dismissed, to require the joinder of Seaboard Surety Company as a party plaintiff in said cause, and to summon said Seaboard Surety Company to appear in said action, pursuant to the provisions of Rules 19 and 21, Federal Rules of Civil Procedure, on the ground that said Seaboard Surety [4] Company is the real party in interest and a necessary party plaintiff in said cause, as will more fully appear from the Affidavit of A. W. Scribner, hereto attached and made a part hereof.

This Motion is and will be based upon the records and files in this cause and upon the Affidavit of A. W. Scribner, hereto attached, marked "Exhibit A" and by this reference made a part hereof.

Dated this 27th day of May, 1957.

LUXAN & SCRIBNER,

/s/ A. W. SCRIBNER,

Attorneys for Defendant.

### Notice

To McNeil Construction Company, Plaintiff Herein;  
Seaboard Surety Company; and to Messrs.  
Brown, Sande, Symmes & Forbes, Attorneys  
for Plaintiff and for Said Seaboard Surety  
Company:

You and each of you will please take notice that the defendant will present the foregoing Motion

and bring the same on for hearing before the above-entitled Court on the next law and motion day to be held by said Court following five (5) days after the service of this Notice.

Dated this 27th day of May, 1957.

LUXAN & SCRIBNER,

/s/ A. W. SCRIBNER,

Attorneys for Defendant. [5]

EXHIBIT A

Affidavit

State of Montana,

County of Lewis and Clark—ss.

A. W. Scribner, being first duly sworn, deposes and says:

1. That he is one of the attorneys for the defendant in the above-entitled cause, and that he makes this Affidavit on behalf of said defendant and in support of the Motion attached hereto.

2. That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Montana and that it maintains its principal place of business in Livingston, Park County, Montana, which, under the provisions of Rule 9-2, Rules of the United States District Court, for the District of Montana, is in the Helena Division of said Court.

That defendant resides in, and is subject to suit and process in, said Helena Division. That the action is not of a local nature, and Affiant knows of no good or sufficient reason why the action should be prosecuted in the Billings Division of this Court.

3. Affiant is informed and believes that, prior to the commencement of this action, the alleged loss claimed by the plaintiff herein, was paid to said plaintiff by Seaboard Surety Company, pursuant to the provisions of a contract of insurance in force between said parties and/or the provisions of an indemnity bond given by said Seaboard Surety Company to the plaintiff, and that by reason thereof, said Seaboard Surety Company became and is subrogated to the claimed rights of the plaintiff, and is the real party in interest and a necessary party plaintiff in this action. Said Seaboard Surety Company is subject to the jurisdiction of this Court as to both service of process and venue and can be made a party plaintiff without depriving the Court of jurisdiction of the parties before it. Affiant is informed and believes that Messrs. Brown, Sande, Symmes & Forbes, the attorneys for plaintiff herein, are also the attorneys for said Seaboard Surety Company, and that [6] said attorneys have been employed by said Seaboard Surety Company to take care of its interests in connection with this action and the matters alleged in the Complaint.

/s/ A. W. SCRIBNER.

Subscribed and sworn to before me this 27th day of May, 1957.

[Seal]     /s/ MAUREEN H. CONNOLLY,  
Notary Public for the State of Montana, Residing  
at Helena, Montana.

My Commission expires April 4, 1959.

[Endorsed]: Filed May 28, 1957. [7]

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[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS UNDER RULE  
36 OF THE FEDERAL RULES OF CIVIL  
PROCEDURE

To the Above-Named Defendant, the Livingston  
State Bank, and to Luxon & Scribner, Its At-  
torneys,

Sirs:

Please take notice that pursuant to Rule 36 of the Federal Rules of Civil Procedure you are hereby requested within 10 days from the date of service of this request to admit the truth of the facts hereinafter set forth for the purposes of this action only and subject to all pertinent objections to admissibility which may be interposed at trial. Failure to comply will subject you to the penalties of Rule 37 (c) of the Federal Rules of Civil Procedure.

1. That at all times mentioned in the complaint the plaintiff, McNeil Construction Company, was



and now is a corporation organized and existing under the laws of the State of California.

2. That at all times mentioned in the complaint the defendant, The Livingston State Bank, was and now is a corporation organized and existing under and by virtue of the laws of the State of Montana.

3. That on or about October 26, 1956, Mr. Coghlant was an employee of The Livingston State Bank, a corporation.

4. That on or about October 26, 1956, said Mr. Coghlant of The Livingston State Bank placed a telephone call to the plaintiff, McNeil Construction Company, and in the course of the ensuing conversation stated that the defendant had received two checks purportedly drawn by the McNeil Construction Company on The Livingston State Bank, which said Mr. Coghlant thought were forgeries. [8]

5. That on or about October 26, 1956, plaintiff sent to the defendant, The Livingston State Bank, a telegram signed by T. J. O'Hara, McNeil Construction Company, a copy of which is attached hereto as Exhibit A and made a part hereof as if set forth in full, and that said telegram was received by The Livingston State Bank on or about October 26, 1956.

6. That on or about October 26, 1956, the plaintiff, McNeil Construction Company, wrote to The Livingston State Bank at Livingston, Montana, and that annexed hereto as Exhibit B and made a part

hereof as if set forth in full is a true and complete copy of the letter sent to The Livingston State Bank by the McNeil Construction Company, and which was received by The Livingston State Bank on or about October 27, 1956.

7. That on or about October 29, 1956, the defendant, The Livingston State Bank, delivered to agents of the Federal Bureau of Investigation 29 payroll checks drawn on the account maintained by the plaintiff herein in The Livingston State Bank, each of which checks was drawn and payable to the order of one Lex Lamb, and each of which was for the sum of \$143.04, and that upon delivery of said checks to agents of the Federal Bureau of Investigation, said agent or agents of the Federal Bureau of Investigation delivered to The Livingston State Bank a receipt typed on stationery of The Livingston State Bank, Livingston, Montana, dated October 29, 1956, a copy of which is attached hereto as Exhibit C and made a part hereof as if set forth in full.

8. That each of the checks referred to in Exhibit C attached hereto was forged, and that each of said checks was paid by the defendant from funds on deposit with the defendant and which had been deposited by the plaintiff, McNeil Construction Company, and that no part thereof has been refunded to the plaintiff by the defendant.

9. That on or about November 1, 1956, Claude R. Erickson, as president of the defendant, The

Livingston State Bank, wrote to the plaintiff, McNeil Construction Company, and that attached hereto as Exhibit D and made a part hereof as if set forth in full is a true, correct and genuine copy of the letter sent to the plaintiff by the defendant as aforesaid.

10. That on or about November 2, 1956, Claude R. Erickson as president of the defendant, The Livingston State Bank, wrote to the plaintiff, McNeil Construction Company, and that attached hereto as Exhibit E and made a part hereof as if set forth in full is a true, correct, complete and genuine copy of said letter of November 2, 1956.

11. That on or about December 4, 1956, Claude R. Erickson as president of The Livingston State Bank wrote to the plaintiff, and that a true, correct, complete and genuine copy thereof is attached hereto [9] as Exhibit F and made a part hereof as if set forth in full.

12. That from September 13, 1956, to September 28, 1956, one Lex Lamb was employed by the plaintiff, McNeil Construction Company, on construction work being conducted by it in Yellowstone National Park, Wyoming.

13. That subsequently, and on or about February 6, 1957, said Lex Lamb was arrested in Panama City, Florida, by agents of the Federal Bureau of Investigation on a warrant charging him with forging the checks hereinabove referred to.

14. That thereafter said Lex Lamb admitted to agents of the Federal Bureau of Investigation that he stole the payroll checks referred to above from the plaintiff, and that he forged plaintiff's name to 29 of them.

15. That these forged checks were paid by defendant from funds deposited with defendant by plaintiff, and that defendant has not refunded or repaid the same to the plaintiff.

Dated this 29th day of May, 1957.

BROWN, SANDE, SYMMES &  
FORBES,

By /s/ WEYMOUTH D. SYMMES,  
Attorneys for Plaintiff. [10]

EXHIBIT A

Western Union  
Telegram

(Copy)

October 26, 1956.

3:25 p.m.

Livingston State Bank,  
Livingston, Montana.

Attention: Mr. C. Coghland:

This is to confirm information given you that payroll checks for our Yellowstone Park job Nos. 8401

to and including 8800, have been stolen. This is our request that you do not honor any payroll checks cleared to your bank in this numerical group.

T. J. O'HARA,  
McNeil Construction Co. [11]

EXHIBIT B

McNeil Construction Company  
5858 Wilshire Boulevard  
Los Angeles 36, California  
Canyon Village  
Yellowstone Park, Wyoming

October 26, 1956.

Livingston State Bank,  
Livingston, Montana.

Attention: Mr. Coghland.

Subject: McNeil Construction Company,  
Payroll Checks Nos. 8401-8800, Inclusive.

Dear Sir:

This letter will confirm our conversation over the telephone this morning in which we requested you to stop payment on all checks listed above.

We have notified the Chief Ranger here in the Park this date as to the missing checks, and also the party's name, Lex Lamb, who might possibly be the individual involved in the forging of subject checks.



Any more information that you might obtain on these checks which would be of help to this firm would be greatly appreciated.

Thank you for your help in this matter.

Very truly yours,

McNEIL CONSTRUCTION CO.,

R. H. WESTLUND,

Project Manager. [12]

### EXHIBIT C

Livingston State Bank

Livingston, Montana

October 29, 1956.

Received from the Livingston State Bank, McNeil Construction Company Payroll Checks, payable to Lex Lamb, in the amount of \$143.04:

No. 8402—Dated September 26, 1956.

No. 8409—Dated September 26, 1956.

No. 8410—Dated September 26, 1956.

No. 8411—Dated September 26, 1956.

No. 8412—Dated September 26, 1956.

No. 8420—Dated September 25, 1956.

No. 8422—Dated September 25, 1956.

No. 8430—Dated September 26, 1956.

No. 8602—Dated September 25, 1956.

No. 8604—Dated September 26, 1956.

No. 8608—Dated September 25, 1956.

No. 8614—Dated September 25, 1956.

No. 8616—Dated September 25, 1956.

No. 8617—Dated September 25, 1956.

No. 8622—Dated September 26, 1956.

No. 8623—Dated September 26, 1956.

No. 8626—Dated September 26, 1956.

No. 8627—Dated September 26, 1956.

No. 8629—Dated September 26, 1956.

No. 8630—Dated September 26, 1956.

No. 8631—Dated September 26, 1956.

No. 8637—Dated September 26, 1956.

No. 8638—Dated September 26, 1956.

No. 8650—Dated September 25, 1956.

No. 8651—Dated September 25, 1956.

No. 8655—Dated September 26, 1956.

No. 8659—Dated September 26, 1956.

No. 8660—Dated September 26, 1956.

Plus 8656.

(Signature Illegible.) [13]

## EXHIBIT D

Livingston State Bank

Livingston, Montana

November 1st, 1956.

McNeil Construction Company,

500 Peruvian Way,

Los Angeles 24, California.

Gentlemen:

Under separate cover we are mailing your statement for the month of October. You will find several checks are not included with this statement and a receipt is enclosed signed by a Special Agent of the Federal Bureau of Investigation. The checks listed on the receipt have been taken by the Agent to help in their efforts to apprehend the person who they believe stole the checks reported as having been taken from your office at Canyon.

We have reported this to the Insurance Company that carries our Blanket bond and they, undoubtedly, will be checking with you to see what various insurance coverage you may carry to determine who has primary coverage.

One of your checks that came into the Bank last Friday looked a little suspicious so we called your Canyon office and were advised at that time about the missing checks.

I might add that the person who is negotiating these checks certainly appears to be an expert as the signatures are very good.

As soon as we hear more we will contact you, however, the discovery of this was so close to the end of the month that we decided to have the Agent from the Federal Bureau of Investigation sign the receipt for the checks so as not to hold up delivery of your statement.



If you have any questions we would be very happy to have you write us.

Very truly yours,

/s/ CLAUDE R. ERICKSON,  
CLAUDE R. ERICKSON,  
President.

CRE (illegible) [14]

EXHIBIT E

Livingston State Bank  
Livingston, Montana

November 2nd, 1956.

McNeil Construction Company,  
500 Peruvian Way,  
Los Angeles 24, California.

Gentlemen:

We are enclosing herewith one of the checks paid against your account on October 2nd that was reported as being stolen.

We are sending this to you so that you can see the signatures.

Would you please return this to us so that we can also take this check up with our Bonding Company and the Federal Bureau of Investigation?

Very truly yours,

/s/ CLAUDE R. ERICKSON,

CLAUDE R. ERICKSON,  
President.

CRE-e

Affidavit of mailing attached.

[Endorsed]: Filed May 29, 1957. [15]

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[Title of District Court and Cause.]

DEFENDANT'S RESPONSE TO PLAINTIFF'S  
REQUEST FOR ADMISSIONS UNDER  
RULE 36 OF THE FEDERAL RULES OF  
CIVIL PROCEDURE

To: McNeil Construction Company, Plaintiff, and  
to Brown, Sande, Symmes & Forbes, Its At-  
torneys:

The Livingston State Bank, a corporation, de-  
fendant herein, in response to plaintiff's Request  
for Admissions under Rule 36 of the Federal Rules  
of Civil Procedure, admits, denies and alleges as  
follows:

1. Admits the matters contained in request No. 1.
2. Admits the matters contained in request No. 2.

3. Admits the matters contained in request No. 3, except that the name of the employee referred to is Coghlan.

4. Admits that on or about October 26, 1956, Mr. Coghlan placed a telephone call to the plaintiff and in the course of the ensuing conversation stated that the defendant had received two checks purportedly drawn by the McNeil Construction Company on The Livingston State Bank, but denies that Mr. Coghlan stated that he thought said checks were forgeries.

5. Admits the matters contained in request No. 5.

6. Admits the matters contained in request No. 6.

7. Admits the matters contained in request No. 7.

8. Admits that each of the checks referred to on Exhibit C [17] attached to the request was paid by the defendant from funds on deposit with the defendant which had been deposited by the plaintiff, McNeil Construction Company, and that no part thereof has been refunded to the plaintiff by the defendant. Defendant is unable truthfully either to admit or deny the other statements contained in said request No. 8 for the reason that neither the defendant or any of its agents has any knowledge as to the truth of the facts contained therein and it is impossible for them to secure the necessary information by reasonable inquiry.

9. Admits the matters contained in request No. 9.

10. Admits the matters contained in request No. 10.

11. Admits the matters contained in request No. 11.

12. Admits that one Lex Lamb was employed by the plaintiff for a period after September 13, 1956, on construction work being conducted by it in Yellowstone National Park, Wyoming. Defendant is unable truthfully either to admit or deny that the period of employment covered the dates referred to in said request No. 12 for the reason that neither the defendant nor any of its agents has knowledge as to such facts and that it is impossible for them to secure the necessary information by reasonable inquiry.

13. Admits that subsequently and on or about February 6, 1957, said Lex Lamb was arrested in Panama City, Florida, but denies that said arrest was made by agents of the Federal Bureau of Investigation on a warrant charging him with forging the checks hereinabove referred to.

14. Defendant is unable truthfully either to admit or deny the matters contained in request No. 14 for the reason that neither the defendant nor any of its agents has any knowledge as to the truth of said matters and it is impossible for them to secure the necessary information by reasonable inquiry.

15. Admits that the checks referred to in Exhibit C attached to the request were paid by the

defendant from funds deposited with [18] defendant by plaintiff, and that defendant has not refunded or repaid the same to the plaintiff. The defendant is unable truthfully either to admit or deny whether the checks were forged for the reason that neither the defendant nor any of its agents has any knowledge as to the truth of such statement, and it is impossible for them to secure the necessary information by reasonable inquiry. The only available sources of information, to the knowledge of this defendant, are the plaintiff and its employees.

Dated this 3rd day of June, 1957.

LUXAN & SCRIBNER,

/s/ A. W. SCRIBNER,

Attorneys for Defendant.

State of Montana,  
County of Park—ss.

Terry J. Coghlan, being first duly sworn, deposes and says: That he is the Cashier of The Livingston State Bank, a corporation, the defendant in the above-entitled cause, and that he makes this verification as such officer for and on behalf of said corporation; that he has read the foregoing response to Request for Admissions under Rule 36 of the Federal Rules of Civil Procedure, and knows the contents thereof and that the matters and things stated therein are true.

/s/ TERRY J. COGHLAN.



Subscribed and sworn to before me this 6th day of June, 1957.

[Seal]      /s/ EDNA M. DUTT,  
Notary Public for the State of  
Montana.

My Commission expires Feb. 1, 1959.

[Endorsed]: Filed June 10, 1957. [19]

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[Title of District Court and Cause.]

### MOTION

The plaintiff above named respectfully moves this Court as follows:

1. To grant to the plaintiff in this action summary judgment for the relief demanded in the Complaint. This Motion is based upon the attached affidavits of Lexington Lamb, R. H. Westlund, and Weymouth D. Symmes, together with the plaintiff's request for admissions heretofore served upon the defendant, and upon defendant's response thereto.

BROWN, SANDE, SYMMES &  
FORBES,

By /s/ WEYMOUTH D. SYMMES,  
Attorneys for Plaintiff. [21]

State of Kansas,  
Leavenworth County—ss.

I, Lexington Lamb, having been first duly sworn, state that upon my oath I was employed by the Mc-

Neil Construction Company at Yellowstone National Park in the State of Wyoming during the month of September, 1956. To the best of my recollection I worked as an employee of the McNeil Construction Company for a period of two to three weeks. During that time I was employed by McNeil Construction Company as a night watchman and ambulance driver and switchboard operator. My immediate supervisor was Dick Pierce. My salary was at the rate of \$1.92 per hour and I received my wages in the form of a check with the name of the McNeil Construction Company on it. The McNeil Construction Company withheld from my salary federal income withholding tax, and social security as well as an amount of \$28.00 per week for my room and board. I worked directly under the supervision of McNeil Construction Company personnel, and the equipment that I used to perform my duties was owned by the McNeil Construction Company. I left the employ of the McNeil Construction Company voluntarily by merely leaving the job at the end of one of my regular night shifts, which were from 7:30 p.m. to 7:30 a.m. Prior to leaving the McNeil Construction Company and while I was still on the payroll of the McNeil Construction Company I took a number of Blank checks of the McNeil Construction Company and made out twenty-nine or thirty of them payable to "Lex Lamb" or "William L. Lamb" in the amount of \$143.04 each. I forged the signatures of a Mr. Westland and a Mr. Wilson as the makers of these McNeil Construction Company checks. The day I left the job I cashed the first of

these checks in Canyon Junction, Wyoming. I subsequently cashed the remainder of the checks that I had made up at various other places. I do not claim that any of the money that I received as a result of cashing these checks was legally due me, except that I do claim that when I left the employ of the McNeil Construction Company there was due me \$70.00 to \$80.00 of unpaid wages still owing me which I have not as yet been paid. I make this affidavit at the Federal Penitentiary at Leavenworth, Kansas, where I am presently serving a prison sentence on this 27th day of June, 1957, in the presence of William A. Rundle, Jr., Frank V. O'Brien, and Clara Hebling. I further state that no inducement nor promise or benefit has been extended to me for the making of this affidavit, and I do so voluntarily and of my own free will. I am thirty-one years of age.

Further affiant saith not.

/s/ LEXINGTON LAMB.

Subscribed and sworn to before me this 27th day of June, 1957.

[Seal]      /s/ CLARA HEBLING,  
Notary Public, Leavenworth  
County, Kansas.

My commission expires March 27, 1961. [22]



[Title of District Court and Cause.]

AFFIDAVIT

State of Montana,  
Yellowstone National Park—ss.

R. H. Westlund, having been first duly sworn, deposes and says:

1. I am an employee of the McNeil Construction Company, the plaintiff in the above-entitled action, and I was employed as Project Manager by the McNeil Construction Company of certain work being conducted by McNeil Construction Company in Yellowstone National Park, Wyoming, during the month of September, 1956. During that period of time the company maintained offices at or near Canyon Village in Yellowstone National Park. In the construction business there is a rapid turnover of workmen by reason of the fact that most workers employed by construction companies such as plaintiff are transients. This is particularly true when work is being done in a national park such as Yellowstone National Park where there are no permanent residents or inhabitants capable of being hired to do the necessary manual labor. As a consequence, when workmen are employed it is virtually impossible to check upon their back records.

2. On September 13, 1956, an individual [23] calling himself Lex Lamb applied for and was given a position as a laborer by the McNeil Construction Company at its offices in Canyon Village, and he commenced work on September 13, 1956. He had a

Social Security card, and during the period of his employment Social Security as well as federal income tax was taken from his weekly salary.

3. During this period of time all of the McNeil Construction Company payroll checks were kept in a four-drawer file cabinet in the timekeeper's office in Yellowstone National Park. During the daytime when construction work was going on, this office was always occupied by a trusted employee. During the evening and every night, the only access to this office was through a locked door window or a small pass window in the wall which is approximately 1 foot by 2 feet. Lex Lamb was employed by us from September 13, 1956, through September 28, 1956.

4. On October 26, 1956, we received a telephone call from Coghlan, an employee of the defendant, The Livingston State Bank, in which he advised us that he had two payroll checks which he "thought" were forgeries. This call was received in the morning on October 26, 1956. Upon receiving this call we made an immediate check of our existing checks, and found one package of checks was missing which included check Nos. 8401 to 8800. This was the first notice we had that our printed payroll checks had been stolen. We immediately issued a stop payment on this group of checks to the bank in a letter of the same date. We also notified the Park Rangers, who in turn notified the Federal Bureau of Investigation. The reason we did not miss the checks before we were notified by the bank is that there are a number of packages of checks in numerical order stacked on top of the packages of checks

which were stolen, and as we had not reached check No. 8400 in the course [24] of our business operations and there was no reason to suspect that these payroll checks had been stolen.

5. All reasonable precautions were taken by the McNeil Construction Company to avoid the theft of anything located in the timekeeper's office, including payroll checks. Likewise, we did everything that was reasonably possible to employ only honest and trusted individuals. We have been advised by the Federal Bureau of Investigation that as a result of their inquiry they are convinced that the checks were stolen by Lex Lamb during the period of his employment, and I also am advised that an affidavit has been obtained by the plaintiff's attorneys from Lex Lamb in which he admits stealing these payroll checks during the period of his employment by McNeil. A total of 29 of these checks forged by Lex Lamb as aforesaid each in the amount of \$143.04 were honored by the defendant, The Livingston State Bank, from funds plaintiff had on deposit with that bank and plaintiff has not been reimbursed therefor.

/s/ R. H. WESTLUND.

Subscribed and sworn to before me this 15th day of July, 1957.

[Seal]      /s/ FRED T. BURKE,

Notary Public for the State of  
Montana.

My commission expires October 21, 1957. [25]

[Title of District Court and Cause.]

### AFFIDAVIT

State of Montana,  
County of Yellowstone—ss.

Weymouth D. Symmes, having been first duly sworn, deposes and says:

1. Deponent is an attorney at law and a member of the law firm of Brown, Sande, Symmes & Forbes, attorneys for the plaintiff in this action. This affidavit is submitted in support of the plaintiff's application for summary judgment, and is submitted with the affidavit of Lexington Lamb and R. H. Westland submitted herewith. This affidavit is executed by deponent because he is personally familiar with the facts hereinafter set forth and has in his possession the original checks hereafter more specifically referred to which will be offered in evidence in the course of the hearing of this motion.

2. As more fully appears in the annexed affidavit of Lexington Lamb and Mr. Westland of the McNeil Construction Co., Mr. Lamb was employed by the McNeil Construction Co. during the month of September, 1956, and at the time he was employed he stole a number of payroll checks from the offices of the McNeil Construction Co. Twenty-nine of these checks were cashed by him and were honored by the defendant, [26] Livingston State Bank; each check was in the sum of \$143.04.



3. The first check which was received by the Livingston State Bank was check No. 8650 and it was dated September 25, 1956. It recited that the payee's badge number was 77631 and that it was for the pay period ending "9-26-56." This check was payable to the order of "Lex Lamb" for \$143.04 and was endorsed by Lex Lamb and evidently cashed at Bedeman's Conoco Service, Livingston, Montana. It was received by the Livingston State Bank on or before October 1, 1956, and was stamped "paid" on "10-1-56."

4. The next day and on October 2, 1956, the Livingston State Bank received three identical checks, each payable to Lex Lamb, each in the sum of \$143.04, each dated September 25, 1956, except one which was dated September 26, 1956, and each recited on their face that they were for the pay period ending "9-26-56," each check was endorsed by "Lex Lamb," one of which was ultimately submitted for deposit to the National Park Bank of Livingston, Montana, one to the Security Trust & Savings Bank of Billings, Montana, and one was evidently cashed directly at the Livingston State Bank for it bears only the endorsement of "Lex Lamb." Each check was stamped "paid 10-2-56."

5. On October 3, 1956, eight of these checks cleared through the Livingston State Bank and each were marked paid on the same date; each was dated September 26, 1956, each was payable to the order

of Lex Lamb, and each was for the pay period ending "9-26-56."

6. On October 4, 1956, six checks were stamped paid by the Livingston State Bank on "10-4-56"; each was payable to the order of Lex Lamb in the sum of \$143.04, each was for the pay period ending "9-25-1956." On October 5, 1956, three checks identical to the checks described in the previous [27] sentence were stamped "paid" by the Livingston State Bank; each was for \$143.04, each was payable to the order of Lex Lamb, and each was for the pay period ending "9-26-1956." On October 6, 1956, three more checks were stamped paid by the Livingston State Bank, each payable to Lex Lamb, each for \$143.04, and each for the pay period ending "9-26-1956." On October 9, 1956, four checks, each payable to Lex Lamb, each for \$143.04, and each for the pay period ending "9-26-1956" were stamped paid by the Livingston State Bank. The 29th check deponent does not have in his files and is not certain as to when that check was cashed.

7. In any event, it is submitted that the receipt and payment of 29 checks over a short period of time, each for the identical pay period and each payable to the same payee shows a gross and careless disregard of the property rights of the plaintiff. Each of these checks were forged as more particularly appears in the annexed affidavit of Lex Lamb.

/s/ WEYMOUTH D. SYMMES.

Subscribed and sworn to before me this 19th day of August, 1957.

[Seal]      /s/ CHARLES B. SANDE,  
Notary Public for the State  
of Montana.

My Commission expires February 7, 1958.

Affidavit of mailing attached.

[Endorsed]: Filed August 19, 1957. [28]

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[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION  
TO ADD SEABOARD SURETY COMPANY  
AS A PARTY

State of Montana,  
County of Yellowstone—ss.

Weymouth D. Symmes, having been first duly sworn, deposes and says:

1. I am an attorney at law and a member of the firm of Brown, Sande, Symmes & Forbes, attorneys for the plaintiff in the above-entitled action. I submit this affidavit in opposition to the defendant's application for an order requiring that Seaboard Surety Company be added as a party plaintiff to this action. The reason this affidavit is submitted by your deponent rather than the plaintiff is that the plaintiff has no officer or official in Yellowstone County, Montana, qualified to execute an affidavit. In addition to the foregoing, deponent personally

participated in the matters hereafter set forth and is acquainted with the facts hereinafter set forth of his own knowledge.

2. Although Seaboard Surety Company issued an indemnity bond on behalf of the plaintiff, McNeil Construction Company, no payment has been made by Seaboard Surety Company pursuant to the terms of said bond. On the contrary, annexed hereto as Exhibit A and made a part hereof as if set forth in full is a copy of the statement of claim filed by McNeil [30] Construction Company with the Seaboard Surety Company. Annexed hereto as Exhibit B and made a part hereof as if set forth in full is a loan receipt agreement made by McNeil Construction Company to the Seaboard Surety Company. Other than as therein specifically provided, no money has been paid by Seaboard Surety Company to the McNeil Construction Company for the loss more particularly referred to in the complaint on file herein. Under the circumstances, it is respectfully submitted that Seaboard Surety Company is not a proper party to this action, and that it should not be made a party hereto.

3. The position of both Seaboard Surety Company and the plaintiff in this action is that primary liability for the cashing of the 29 forged checks by The Livingston State Bank rests solely and exclusively with The Livingston State Bank and its bonding company, which I am informed and believe and therefore allege is the St. Paul Indemnity Co.

/s/ WEYMOUTH D. SYMMES.



Subscribed and sworn to before me this 22nd day of August, 1957.

[Seal]      /s/ ROCKWOOD BROWN, JR.,  
Notary Public for the State  
of Montana.

My commission expires Sept. 14, 1957. [31]

## EXHIBIT A

Seaboard Surety Company  
New York, N. Y.

### Statement of Claim

Claim is presented by McNeil Construction Co. for loss resulting from default under Bond No. RLA 11514 dated Aug. 4, 1956-Aug. 4, 1959, in the amount of \$10,000.00 on behalf of Lex Lamb employed in the position former employee at Yellowstone Park, Wyoming.

### Detailed Statement of Claim

400 payroll checks were stolen from the job office of McNeil Construction Co. at Canyon Village, Yellowstone Park, Wyoming. 29 of these checks, in the sum of \$143.04 each, were subsequently forged and cashed at the Livingston Bank, Livingston, Montana, by Lex Lamb, a former employee.



## EXHIBIT B

## Loan Receipt

Received from the Seaboard Surety Company (hereinafter referred to as "Company") the sum of Four Thousand One Hundred Forty-eight Dollars and Sixteen Cents (4,148.16) Dollars as a loan, without interest, repayable only in the event and to the extent of any net recovery the undersigned may make from any person, persons, corporation or corporations, or other parties, causing or liable for the loss or damage described in the attached "Statement of Claim" incorporated herein, by reference or from any insurance, and as security for such repayment the undersigned hereby pledges to the said Company all of his, its or their claim or claims against said person, persons, corporation or corporations or other parties, or from any insurance carrier or carriers.

The undersigned covenants that no settlement has been made by the undersigned with any person, persons, corporation or corporations, or other parties, against whom a claim may lie, and no release has been given to anyone responsible for such loss and that no settlement will be made, nor release given without written consent of the said Company; and the undersigned (McNeil Construction Co.) covenants and agrees to co-operate fully with the said Company to permit it, at its own expense, to promptly present claim and, if necessary to likewise

permit it at its own expense to commence, enter into and prosecute suit in the undersigned name against each person or persons, corporation or corporations, or other parties, through whose negligence or other fault the aforesaid loss was caused, or who may otherwise be responsible therefor, with all due diligence, in his, its or their own name.

In further consideration of said advance, the undersigned guarantee(s) that he, it or they are entitled to recover upon said claim for loss or damage, and hereby appoint(s) the [33] managers and/or agents of the said Company and their successors severally, his, its or their agent(s) and attorney(s)-in-fact, with irrevocable power to collect any such claim or claims, and to begin, prosecute, compromise or withdraw in his, its or their name, but at the expense of the Company, any and all legal proceedings that the said Company may deem necessary to enforce such claim or claims, and to execute in the name of the undersigned, any documents that may be necessary to carry the same into effect for the purposes of this agreement. Otherwise the Company shall have final authority over legal proceedings and no settlement or compromise decision or action shall be made without the express consent of the Company or its agents.

In Witness Whereof, McNeil Construction Co. has hereunto set its hand and seal this 10th day of April, 1957.

McNEIL CONSTRUCTION CO.,

By F. M. FRANZ,  
Gen. Mgr.

In Presence of:

(Signature illegible).

State of California,  
County of Los Angeles.

On the 10th day of April, 1957, personally appeared before me ..... , to me known to be the individual described in, and who executed the foregoing instrument, and acknowledged that he executed the same.

[Seal]                      KATHLEEN M. WRIGHT,  
Notary Public.

My Commission Expires September 15, 1957.

Affidavit of mailing attached.

[Endorsed]: Filed August 22, 1957. [34]



[Title of District Court and Cause.]

### AFFIDAVIT

State of Montana,

County of Lewis and Clark—ss.

A. W. Scribner, being first duly sworn, deposes and says:

He is one of the attorneys for the defendant in the above-entitled cause and he makes this Affidavit for and on behalf of said defendant and in opposition to the plaintiff's Motion for Summary Judgment on file herein.

Affiant further states that Summons and Complaint in the above action were served upon the defendant on the 14th day of May, 1957, and that within twenty (20) days thereafter as provided by law the defendant served upon the plaintiff and filed herein its Motion requesting the Court as follows:

1. To dismiss the action, pursuant to the provisions of Section 1406, Title 28, United States Code, on the ground that said action is filed in the wrong division, because (a) it is a civil action, not of a local nature, against a single defendant, and (b) the defendant resides and maintains its principal place of business in Park County, Montana, in the Helena Division of said Court.

2. To dismiss the action because the Complaint

fails to state a claim against the defendant upon which relief can be granted.

3. In the event said action is not dismissed, to transfer said [36] action to the Helena Division of said Court, pursuant to the provisions of Section 1406, Title 28, United States Code, on the ground that said action is filed in the wrong division because (a) it is a civil action, not of a local nature, against a single defendant, and (b) the defendant resides and maintains its principal place of business in Park County, Montana, in said Helena Division.

4. In the event said action is not dismissed, to require the joinder of Seaboard Surety Company as a party plaintiff in said cause, and to summon said Seaboard Surety Company to appear in said action, pursuant to the provisions of Rules 19 and 21, Federal Rules of Civil Procedure, on the ground that said Seaboard Surety Company is the real party in interest and a necessary party plaintiff in said cause, as will more fully appear from the Affidavit of A. W. Scribner, hereto attached and made a part hereof.

Attached to and made a part of the aforesaid Motion was an Affidavit made and executed by A. W. Scribner, Affiant herein, setting forth facts in support of the defenses raised. The aforesaid Motion and supporting Affidavit are hereby expressly referred to and by this reference incorporated herein and made a part hereof.

The aforesaid Motion is still pending before this Court and has not previously been submitted because the Court has not held a law and motion calendar since the date that said Complaint was filed. For these reasons the defendant has not filed a responsive pleading in said cause and has not had occasion to meet the factual issues raised by plaintiff's Complaint or to interpose affirmative defenses thereto.

The above-entitled cause has been pending for only about three (3) months, and only six (6) days have elapsed since the date of service of said Motion for Summary Judgment, and for these reasons neither defendant nor its counsel have had sufficient time in which to secure affidavits, utilize the discovery procedures, or otherwise obtain opposing evidence. Furthermore, much of the information [37] upon which the defense of this case is based is within the exclusive knowledge of the plaintiff or its agents, and must, therefore, be acquired by the testimony of adverse witnesses. In view of the foregoing, it is impossible at this time for the defendant to produce affidavits of persons with personal knowledge of the facts essential to establish its affirmative defenses to said Complaint. However, Affiant states of his own knowledge that the defendant intends to raise the following defenses in its responsive pleading, if a responsive pleading becomes necessary, in addition to the defenses heretofore raised in its Motion to dismiss:

1. That plaintiff herein was guilty of negligence

which was the proximate cause of its loss and which precludes it from setting up the alleged forgery as a claim against the defendant.

2. The real party plaintiff in interest herein, to wit: The Seaboard Surety Company, has indemnified the defendant against any and all liability on account of forged checks drawn on the plaintiff company, and thus has no standing to maintain this action, through its nominal party plaintiff or otherwise.

To substantiate its defense set forth in Paragraph numbered 1, above, the defendant intends to present the following evidence at a trial of this cause, all of which evidence, according to Affiant's best information and belief, is true:

The said Lex Lamb referred to in plaintiff's Complaint was employed by the plaintiff on or about September 13, 1956, at Canyon Village in Yellowstone National Park. Prior to employing the said Lex Lamb the plaintiff made no investigation as to his character or trustworthiness, and made no attempt whatsoever to determine the same. If the plaintiff's employees had made the slightest investigation at said time, they would have discovered (if they did not then know) that the said Lex Lamb was a notorious criminal and a fugitive from justice and that at that time there were two or more warrants outstanding for this man's arrest under the same name upon [38] charges of embezzlement. Not-



withstanding the fact that plaintiff's employees knew, or in the exercise of the slightest precaution should have known, that Lex Lamb was untrustworthy, they hired him without reservation and immediately placed him in the position of night watchman, a position which gave him uncontrolled access to the timekeeper's office and the company files. While so employed the said Lex Lamb took advantage of the opportunity afforded him by the plaintiff's negligence and stole from the plaintiff a block of four hundred (400) numbered payroll checks. Thereafter and about September 27, 1956, the said Lex Lamb left the employment of the plaintiff by simply leaving the job, and without requesting his accrued wages. Although these events should have caused plaintiff's employees to suspect a possible theft, they nevertheless made no investigation to determine whether a theft had been committed. Had they made the slightest investigation, they would have discovered the theft of the payroll checks and thus would have been able to prevent their subsequent negotiation. Although the plaintiff knew or in the exercise of reasonable care should have known that four hundred (400) of its payroll checks were missing or stolen, it nevertheless failed to notify the defendant of that fact and failed to take other steps to prevent their negotiation.

To substantiate its defense set forth in Paragraph numbered 2 above, the defendant intends to present the following evidence at a trial of this cause, all of



which evidence, according to Affiant's best information and belief, is true:

On some date prior to September 13, 1956, the Seaboard Surety Company, the corporation referred to in defendant's Motion, issued to the plaintiff its General Depositor's Forgery Bond, indemnifying the said plaintiff and its depository banks from any and all loss sustained by them as a result of forgery of checks drawn on the plaintiff. The said bond was in full force and effect during all of the times mentioned in plaintiff's Complaint. Neither the [39] defendant nor Affiant has yet had an opportunity to examine the said bond to determine the scope of its provisions, but Affiant is informed and believes that the said bond contained a rider relieving the said Seaboard Surety Company from liability in cases of forgery committed by any employee of the plaintiff. However, the said Seaboard Surety Company is liable in any event because the activities of the said Lex Lamb which gave rise to plaintiff's loss were completed after the said Lex Lamb had left the employment of the plaintiff.

The defendant thus has at least four defenses to said action, two of which were interposed by Motion heretofore filed, and at least two of which it intends to interpose in its responsive pleading and which depend to some extent upon evidence yet to be gathered and introduced in this cause.

Dated this 28th day of August, 1957.

/s/ A. W. SCRIBNER.

Subscribed and sworn to before me this 28th day of August, 1957.

[Seal]      /s/ MAUREEN H. CONNOLLY,  
Notary Public for the State  
of Montana.

My Commission expires April 4, 1959.

[Endorsed]: Filed August 30, 1957. [40]

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[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT IN SUPPORT  
OF MOTION FOR SUMMARY JUDGMENT

State of New York,  
County of New York—ss.

F. V. O'Brien, having been first duly sworn,  
deposes and says:

Deponent is Superintendent of Claims of Seaboard Surety Company, which issued the bonds involved in the above-entitled action. The original bonds which are at the present time in full force and effect and which were in full force and effect during the entire fall of 1956 have been photostated. Attached hereto as Exhibit A and made a part hereof as if set forth in full is a true, correct and complete photostat at the blanket position bond issued by Seaboard Surety Company to McNeil Construction Company. Attached hereto as Exhibit B and made a part hereof as if set forth in full is a true photostatic copy of the depositories forgery bond

issued by Seaboard Surety Company to McNeil Construction Company.

Exhibit A which is the blanket position bond does not underwrite depository banks. It is to be noted that in the first complete paragraph of Exhibit A Seaboard agrees to indemnify McNeil for any loss caused by the theft or other dishonest act of any employee up to \$10,000 "through any fraudulent or dishonest act or acts committed by any one or more of the [41] Employees as defined in Section 3, acting alone or in collusion with others, during the term of this bond as defined in Section 1, or within thirty (30) days after leaving the service of the Insured (except when such leaving is caused by application of Sections 11 or 12)."

The claim filed by the McNeil Construction Company with Seaboard Surety Company for the fraudulent transactions of Lex Lamb was made under Exhibit A, the blanket position bond. The loan receipt agreement executed by McNeil Construction Company to the Seaboard Surety Company was made through the blanket position bond. It is under this bond that this particular claim is based.

/s/ F. V. O'BRIEN.

Subscribed and sworn to before me this 4th day of September, 1957.

[Seal]     /s/ BETTY C. RODE,

Notary Public for the State  
of New York.

My commission expires March 30, 1958. [42]

## EXHIBIT A

Bond No. F—RLA 11514

Seaboard Surety Company  
Home Office New York

## Blanket Position Bond

In consideration of an agreed premium, Seaboard Surety Company, a corporation of the State of New York, with its Home Office in the City of New York, hereinafter called Underwriter, hereby agrees to indemnify McNeil Construction Co., of 5858 Wilshire Boulevard, Los Angeles, California, hereinafter called Insured, against any loss of money or other property, real or personal (including that part of any inventory shortage which the Insured shall conclusively prove has been caused by the fraud or dishonesty of any Employee or Employees) belonging to the Insured, or in which the Insured has a pecuniary interest, or for which the Insured is legally liable, or held by the Insured in any capacity whether the Insured is legally liable therefor or not, which the Insured shall sustain and discover as provided in Section 2, the amount of indemnity on each of such Employees being Ten Thousand and no/100 Dollars (\$10,000.00) through any fraudulent or dishonest act or acts committed by any one or more of the Employees as defined in Section 3, acting alone or in collusion with others, during the term of this bond as defined in Section 1, or within thirty (30) days after leaving the service



of the Insured (except when such leaving is caused by application of Sections 11 or 12.

Indemnity Against Loss Under  
Prior Bond or Policy

If the coverage of this bond is substituted for any prior bond or policy of insurance carried by the Insured or by any predecessor in interest of the Insured which prior bond or policy is terminated, canceled or allowed to expire as of the time of such substitution, the Underwriter agrees to indemnify the Insured against loss of money or other property, as aforesaid sustained by the Insured and discovered as provided in sub-section (b) of Section 2 and which would have been recoverable by the Insured or such predecessor under such prior bond or policy except for the fact that the time within which to discover loss thereunder had expired; Provided: (1) the indemnity afforded by this paragraph shall be a part of and not in addition to the amount of coverage afforded by this bond; and (2) such loss would have been covered under this bond, had this bond with its agreements, limitations and conditions as of the time of such substitution been in force when the acts or defaults causing such loss were committed; and (3) recovery under this bond on account of such loss shall in no event exceed the amount which would have been recoverable under this bond, in the amount for which it is written as of the time of such substitution, had this bond been in force when such acts or defaults were committed, or the amount which would have been recoverable



under such prior bond or policy had such prior bond or policy had such prior bond or policy continued in force until the discovery of such loss, if the latter amount be smaller.

### The Foregoing Agreement Is Subject to the Following Conditions and Limitations:

#### Term of Bond

Section 1. The term of this bond begins with the 4th day of August, 1953, standard time at the address of the Insured above given, and ends at 12 o'clock night, standard time as aforesaid, on the effective date of the cancelation of this bond in its entirety.

#### Discovery Period

Section 2. Loss is covered under this bond only (a) if sustained through any act or acts committed by any Employee while this bond is in force as to such Employee, subject, however, to the paragraph of this bond entitled Indemnity Against Loss Under Prior Bond or Policy, and (b) if discovered prior to the expiration of twenty-four months from the cancelation of this bond in its entirety as provided in Section 12, or from its cancelation or termination in its entirety in any other manner, whichever shall first happen.

#### Definition of Employee

Section 3. The word Employee or Employees, as used in this bond, shall be deemed to mean, respec-

tively, one or more of the natural persons (except directors or trustees of the Insured, if a corporation, who are not also officers or employees thereof in some other capacity) while in the regular service of the Insured in the ordinary course of the Insured's business during the term of this bond, and whom the Insured compensates by salary, wages, and/or commissions and has the right to govern and direct in the performance of such service, and who are engaged in such service within any of the States of the United States of America, or within the District of Columbia, the Hawaiian Islands, Alaska, Puerto Rico, the Virgin Islands, Canada or Newfoundland, or elsewhere for a limited period, but not to mean brokers, factors, commission merchants, consignees, contractors, or other agents or representatives of the same general character.

Joint Insured (Not applicable where there is but one Insured)

Section 4. If more than one Insured is covered under this bond, the first named Insured shall act for itself and for each and all of the Insured for all the purposes of this bond. Knowledge possessed or discovery made by any Insured or by any partner or officer thereof shall for the purposes of subsection (a) of Section 11 and Sections 13 and 14 constitute knowledge or discovery by all the Insured and cancelation of this bond as to any Employee as provided in Section 11 shall apply to all the Insured. If, prior to the cancelation or termination of

this bond in its entirety, this bond is canceled or terminated as to any Insured, there shall be no liability for any loss sustained by such Insured unless discovered before the expiration of two years from the time such cancelation or termination as to such Insured becomes effective. The liability of the Underwriter for loss or losses sustained by any or all of the Insured shall not exceed the amount for which the Underwriter would be liable had all such loss or losses been sustained by any one of the Insured. Payment by the Underwriter to the first named Insured of loss sustained by any Insured shall fully release the Underwriter on account of such loss. If the first named Insured ceases for any reason to be covered under this bond, then the Insured next named shall thereafter be considered as the first named Insured for all the purposes of this bond.

#### Loss Caused by Unidentifiable Employees

Section 5. If a loss is alleged to have been caused by the fraud or dishonesty of any one or more of the Employees, and the Insured shall be unable to designate the specific Employee or Employees causing such loss, the Insured shall nevertheless have the benefit of this bond, provided that the evidence submitted reasonably (in case of inventory shortage, conclusively) establishes that the loss was in fact due to the fraud or dishonesty of one or more of the said Employees, and provided further that regardless of the number of said Employees concerned or implicated in such loss, the aggregate

liability of the Underwriter for any such loss shall not exceed the amount stated in the opening paragraph of this bond applicable to a single Employee. [43]

### Merger or Consolidation

Section 6. If any natural persons shall be taken into the regular service of the Insured through merger or consolidation with some other concern, the Insured shall give the Underwriter written notice thereof and shall pay an additional premium on any increase in the number of Employees covered under this bond as a result of such merger or consolidation computed pro rata from the date of such merger or consolidation to the end of the current premium period.

### Non-Accumulation of Liability

Section 7. Regardless of the number of years this bond shall continue in force and the number of premiums which shall be payable or paid, the liability of the Underwriter under this bond on account of any one Employee shall not be cumulative in amounts from year to year or from period to period.

### Limit of Liability Under This Bond and Prior Insurance

Section 8. With respect to loss or losses caused by any Employee or which are chargeable to such



Employee as provided in Section 5 and which occur partly under this bond and partly under other bonds or policies issued by the Underwriter to the Insured or to any predecessor in interest of the Insured and terminated or canceled or allowed to expire and in which the period for discovery has not expired at the time any such loss or losses thereunder are discovered, the total liability of the Underwriter under this bond and under such other bonds or policies shall not exceed, in the aggregate, the amount carried under this bond on such loss or losses or the amount available to the Insured under such other bonds or policies, as limited by the terms and conditions thereof, for any such loss or losses, if the latter amount be the larger.

#### Other Insurance

Section 9. If the Insured carries or holds any other insurance or indemnity covering any loss or losses covered by this bond, the Underwriter shall be liable under this bond only for that part of such loss or losses which is in excess of the amount recoverable or recovered from such other insurance or indemnity. In no event shall the Underwriter be liable under this bond for more than the amount of the coverage of this bond applicable to such loss or losses.

#### Salvage

Section 10. If the Insured shall sustain any loss or losses covered by this bond which exceed the



amount of coverage provided by this bond, the Insured shall be entitled to all recoveries, except from suretyship, insurance, reinsurance, security and indemnity taken by or for the benefit of the Underwriter, by whomsoever made, on account of such loss or losses under this bond until fully reimbursed, less the actual cost of effecting the same; and any remainder shall be applied to the reimbursement of the Underwriter.

### Cancelation as to Any Employee

Section 11. This bond shall be deemed canceled as to any Employee: (a) immediately upon discovery by the Insured, or by any partner or officer thereof not in collusion with such Employee, of any fraudulent or dishonest act on the part of such Employee; or (b) at 12 o'clock night, standard time as aforesaid, upon the effective date specified in a written notice served upon the Insured or sent by mail. Such date, if the notice be served, shall be not less than fifteen days after such service, or, if sent by mail, not less than twenty days after the date of mailing. The mailing by the Underwriter of notice, as aforesaid, to the Insured at its Principal Office shall be sufficient proof of notice.

### Cancelation as to Bond in Its Entirety

Section 12. This bond shall be deemed canceled in its entirety at 12 o'clock night, standard time as aforesaid, upon the effective date specified in a written notice served by the Insured upon the

Underwriter or by the Underwriter upon the Insured, or sent by mail. Such date, if the notice be served by the Underwriter, shall be not less than thirty days after such service, or, if sent by the Underwriter by mail, not less than thirty-five days after the date of mailing. The mailing by the Underwriter of notice, as aforesaid, to the Insured at its Principal Office shall be sufficient proof of notice. The Underwriter, on request, shall refund to the Insured the unearned premium computed pro rata if this bond be canceled at the instance of the Underwriter or at short rates if canceled or reduced at the instance of the Insured.

#### Prior Fraud, Dishonesty or Cancellation

Section 13. No Employee, to the best of the knowledge of the Insured, or of any partner or officer thereof not in collusion with such Employee, has committed any fraudulent or dishonest act in the service of the Insured or otherwise.

If prior to the issuance of this bond, any fidelity insurance in favor of the Insured or any predecessor in interest of the Insured and covering one or more of the Insured's employees shall have been canceled as to any of such employees by reason of (a) the discovery of any fraudulent or dishonest act on the part of such employees, or (b) the giving of written notice of cancellation by the insurer issuing said fidelity insurance, whether the Underwriter or not, and if such employees shall not have been reinstated under the coverage of said fidelity insurance

or superseding fidelity insurance, the Underwriter shall not be liable under this bond on account of such employees unless the Underwriter shall agree in writing to include such employees within the coverage of this bond.

#### Loss—Notice—Proof—Legal Proceedings

Section 14. At the earliest practicable moment, and at all events not later than fifteen days after discovery of any fraudulent or dishonest act on the part of any Employee by the Insured, or by any partner or officer thereof not in collusion with such Employee, the Insured shall give the Underwriter written notice thereof and within four months after such discovery shall file with the Underwriter affirmative proof of loss, itemized and duly sworn to, and shall upon request of the Underwriter render every assistance, not pecuniary, to facilitate the investigation and adjustment of any loss. No suit to recover on account of loss under this bond shall be brought before the expiration of two months from the filing of proof as aforesaid on account of such loss, nor after the expiration of fifteen months from the discovery as aforesaid of the fraudulent or dishonest act causing such loss. If any limitation in this bond for giving notice, filing claim or bringing suit is prohibited or made void by any law controlling the construction of this bond, such limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

## Riders

Section 15. The liability of the Underwriter hereunder is subject to the terms and conditions of the following Riders attached hereto:

The Insured by the acceptance of this bond, gives notice to the Underwriter terminating or canceling prior bond(s) No(s) such termination or cancellation to be effective as of the time this bond becomes effective.

Signed, sealed and dated the 11th day of August, 1953.

SEABOARD SURETY COM-  
PANY,

By HOWARD SISKEL,  
Attorney in Fact.

(Executed in Duplicate)

337.50 [44]

## Excess Indemnity Endorsement

1. It is agreed that, subject to the terms of the bond to which this endorsement is attached, the amount of excess indemnity on the Employees performing the duties of the following positions shall be the amount set opposite the names of such positions, respectively. It is further agreed that the amount of such excess indemnity shall apply only to so much of any loss or losses sustained through any fraudulent or dishonest act or acts committed

after such excess indemnity becomes effective as are in excess of the amount recoverable or recovered on account of such loss or losses under said bond.

2. It is further agreed that the liability of the Underwriter under this endorsement on account of any one Employee in any one or more such positions (in the original or an increased or decreased amount) shall not exceed the largest single amount of indemnity on any one position occupied by such Employee.

3. It is further agreed that no excess losses shall be recoverable under this endorsement unless caused by an Employee who has been identified as having caused such loss, anything to the contrary in said bond or this Endorsement notwithstanding. [45]

## EXHIBIT B

Bond No. DF—RLA 11565

Seaboard Surety Company  
Home Office New York

Depositors Forgery Bond

In consideration of an agreed premium, Seaboard Surety Company, a corporation of the State of New York, with its Home Office in the City of New York, hereinafter referred to as Underwriter, hereby undertakes and agrees to indemnify those designated



as Insured in Section 10 of this bond to the amount specified therein for losses sustained and discovered as hereinafter set forth through:

### Insuring Clauses

1. Forgery or Alteration of, on, or in any check, draft, promissory note, bill of exchange, or similar written promise, order or direction to pay a sum certain in money, made or drawn by, or drawn upon the Insured, or made or drawn by one acting as agent of the Insured, or purporting to have been made or drawn as hereinbefore set forth, including

(a) any check or draft made or drawn in the name of the Insured, payable to a fictitious payee and endorsed in the name of such fictitious payee whether or not such endorsement be a forgery within the law of the place controlling the construction thereof; and

(b) any check or draft procured in a face to face transaction with the Insured or with one acting as agent of the Insured by anyone impersonating another and made or drawn payable to the one so impersonated and endorsed by anyone other than the one so impersonated, whether or not such endorsement be a forgery within the law of the place controlling the construction thereof; and

(c) any payroll check, payroll draft or payroll order made or drawn by the Insured, payable to bearer as well as to a named payee and endorsed by anyone other than the named payee without authority from such payee, whether or not such en-

dorsement be a forgery within the law of the place controlling the construction thereof.

Mechanically reproduced facsimile signatures are treated the same as handwritten signatures.

### Indemnity to Depository Banks

2. The Underwriter further agrees to indemnify any bank or banks in which the Insured carries a checking or savings account (each of such banks being hereinafter called Bank) against losses sustained through Forgery or Alteration of, on, or in any of the foregoing instruments made or drawn as hereinbefore set forth and which the Bank shall pay, cash, or take for collection, provided that the liability of the Underwriter for any such losses shall be a part of and not in addition to the amount of insurance applicable to the Insured's office to which such losses would have been allocated had such losses been sustained by the Insured, that losses sustained by the Insured shall be entitled to priority of payment over losses sustained by the Bank, and and that losses under this bond whether sustained by the Insured or the Bank shall be paid directly to the Insured in its own name, except in cases where the Bank shall have already fully reimbursed the Insured for such losses.

### Court Costs and Attorneys' Fees

3. If the Insured or the Bank shall refuse to pay any of the foregoing instruments made or drawn as hereinbefore set forth alleging that such instruments are forged or altered, and such refusal shall

result in suit being brought against the Insured or the Bank to enforce such payment and the Underwriter shall give its written consent to the defense of such suit, then any attorneys' fees, court costs, or similar legal expenses incurred and paid by the Insured or the Bank in such defense shall be construed to be a loss under this bond, and the liability of the Underwriter for such loss shall be in addition to any other liability under this bond.

This Bond Covers Losses, as Aforesaid, Sustained  
and Discovered as Follows:

1. Sustained by the Insured on or after the date hereof and while this bond is in force.

2. Sustained by the Insured at any time before the termination of this bond as an entirety, which would have been recoverable under the coverage of some similar form of forgery insurance (exclusive of fidelity insurance) carried by the Insured or any predecessor in interest of the Insured, had such prior forgery insurance given all of the coverage afforded under this bond; Provided, with respect to any loss or losses covered by this paragraph, that

(a) the coverage of this bond is substituted on or after the date hereof for such prior forgery coverage and the Insured or such predecessor, as the case may be, carried such prior forgery coverage on the office at which such losses were sustained continuously from the time such losses were sustained to the date the coverage of this bond is substituted therefor; and

(b) at the time of discovery of such losses, the period for discovery of loss under all such prior forgery insurance has expired; and

(c) if the amount of this bond applicable to the office at which such losses were sustained is larger than the amount applicable to such office under such prior forgery insurance at the time such losses were sustained, then liability under this bond for such losses shall not exceed the smaller amount.

3. Losses referred to in paragraphs 1 and 2 immediately preceding must be discovered by the Insured prior to the expiration of twelve months after the termination of this bond as an entirety as hereinafter set forth or its termination in any other manner. [47]

The Foregoing Agreement Is Subject to the  
Following Conditions and Limitations:

Exclusion

Section 1. This bond does not cover any loss through Forgery or Alteration of, on, or in registered or coupon obligations issued or purporting to have been issued by the Insured or any coupons attached thereto or detached therefrom.

Joint Insured

(Not applicable where there is but one Insured)

Section 2. If more than one Insured is covered under this bond, the first named Insured shall act for itself and for each and all of the Insured for



all the purposes of this bond. Discovery made by any Insured or by any partner or officer thereof shall for the purpose of Section 9 constitute discovery of all the Insured. If, prior to the termination of this bond in its entirety, this bond is terminated as to any Insured, there shall be no liability for any loss sustained by such Insured unless discovered before the expiration of one year from the time such termination as to such Insured becomes effective. The liability of the Underwriter for loss or losses sustained by any or all of the Insured shall not exceed the amount for which the Underwriter would be liable had all such loss or losses been sustained by any one of the Insured. Payment by the Underwriter to the first named Insured of any loss sustained by any Insured shall fully release the Underwriter on account of such loss. If the first named Insured ceases for any reason to be covered under this bond, then the Insured next named shall thereafter be considered as the first named Insured for all the purposes of this bond.

### Non-Reduction of Liability

Section 3. Payment of loss under this bond shall not reduce the liability of the Underwriter under this bond for other losses whenever sustained; Provided, however, that the total liability of the Underwriter under this bond on account of any loss or losses by reason of forgery or alteration committed by any person or in which such person is concerned or implicated, whether such forgery or alteration



involves one or more instruments, is limited to the amount of insurance applicable to the office to which such loss or losses are allocated.

### Non-Accumulation of Liability

Section 4. Regardless of the number of years this bond shall continue in force and the number of premiums which shall be payable or paid, the liability of the Underwriter under this bond with respect to any loss or losses specified in the Provided clause of Section 3 of this bond shall not be cumulative in amounts from year to year or from period to period.

### Limit of Liability Under This Bond and Prior Insurance

Section 5. With respect to loss or losses set forth in the Provided clause of Section 3 of this bond which occur partly during the period of this bond and partly during the period of other bonds or policies issued by the Underwriter to the Insured or to any predecessor in interest of the Insured and terminated or canceled or allowed to expire and in which the period for discovery has not expired at the time any such loss or losses thereunder are discovered, the total liability of the Underwriter under this bond and under such other bonds or policies shall not exceed, in the aggregate, the amount carried under this bond on such loss or losses or the amount available to the Insured under such other bonds or policies, as limited by the terms

and conditions thereof, for any such loss or losses, if the latter amount be the larger.

### Other Insurance or Indemnity

Section 6. This bond shall be primary with respect to any loss or losses covered by this bond and also by any fidelity insurance carried by the Insured or forgery insurance carried by the Bank. This bond shall be excess over any other insurance, security of indemnity applicable to any losses otherwise covered under this bond.

### Salvage

Section 7. If the Insured or any Bank shall sustain any loss or losses in excess of the amount of insurance provided under this bond but otherwise covered by the terms of this bond, the Insured or such Bank shall be entitled to all recoveries (except insurance or indemnity held by the Underwriter for its own benefit), less the actual cost of effecting the same, until fully reimbursed, the remainder to belong to the Underwriter.

### Termination

Section 8. This bond shall terminate in its entirety—(a) at 12 o'clock night upon the effective date specified in a written notice served by the Underwriter upon the Insured, or sent by mail, and such date, if the notice be served, shall be not less than thirty days after such service, or, if sent by mail, not less than thirty-five days after the date of

mailing, or (b) upon the receipt by the Underwriter of a written request from the Insured to terminate this bond, or (c) immediately upon the taking over of the Insured by a receiver or other liquidator or by State or Federal officials, or (d) immediately upon the taking over of the Insured by another institution. The mailing by the Underwriter of notice, as aforesaid, to the Insured at its Principal Office as designated in this bond, shall be sufficient proof of notice. The Underwriter, on request, shall refund to the Insured the unearned premium computed pro rata if this bond be terminated at the instance of the Underwriter, or if terminated as provided in sub-section (c) or (d) of this Section, or at short rates if terminated or reduced at the instance of the Insured.

#### Loss—Notice—Proof—Legal Proceedings

Section 9. Upon discovery by the Insured of any fact or circumstance indicating a probable loss under this bond, the Insured shall, as soon as practicable after such discovery, notify the Underwriter in writing at the Underwriter's Home Office, giving all details then known to the Insured. The Insured shall within sixty days after such discovery file with the Underwriter a proof of claim sworn to by the Insured and shall also file the instrument which is the basis of such claim. If, however, it shall be impossible to file such instrument, then the affidavit of the Insured or the Bank setting forth the amount and cause of loss shall be accepted in lieu thereof. Any loss for which the Underwriter may

be liable shall be payable immediately upon receipt by the Underwriter of proof of claim as provided above. No action or proceeding shall be brought against the Underwriter unless begun within one year after the Insured's discovery of loss, except that any action or proceeding to recover under this bond for attorneys' fees, court costs or similar legal expenses incurred and paid in any suit mentioned in Insuring Clause 3 shall be begun within one year from the date upon which the judgment in such suit shall have become final. If any period of limitation contained in this bond is prohibited or made void by any law controlling the construction hereof, such period shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

#### Name of Insured—Location—Amount

Section 10. The Insured under this bond are McNeil Construction Co., a partnership composed of Lawrence G. McNeil and Bruce W. McNeil.

Location of Principal Office: 5858 Wilshire Boulevard, Los Angeles, California, and Job Sites.

Amount of Insurance: Twenty-five Thousand and no/100 Dollars (\$25,000.00).

#### Riders

Section 11. The liability of the Underwriter hereunder is subject to the terms and conditions of the following Riders attached hereto: Rider No. I.

The Insured by the acceptance of this bond, gives



notice to the Underwriter terminating or canceling prior bond(s) No(s). . . . ., such termination or cancelation to be effective as of the time this bond becomes effective.

Signed, sealed and dated the 4th day of August, 1953.

SEABOARD SURETY  
COMPANY,

By RAY ROSENDAHL,  
Attorney-in-Fact.

71.73

[48]

Rider No. I

To be attached to and form part of Depositors Forgery Bond, No. RLA 11565, issued by Seaboard Surety Company, in favor of McNeil Construction Co., and dated August 4, 1953.

In consideration of a reduced premium charged for the attached bond, it is hereby agreed that:

1. Anything in the attached bond to the contrary notwithstanding, the Underwriter shall not be liable under Insuring Clause 1, 2 or 3 of the attached bond on account of any loss or losses by reason of Forgery or Alteration committed by or in collusion with any of the officers or employees of the Insured.

2. The attached bond shall be subject to all of its agreements, limitations and conditions except as herein expressly modified.



3. This rider shall become effective as of the beginning of the 4th day of August, 1953.

Signed, sealed and dated August 4, 1953.

By .....,

RAY ROSENDAHL,

Attorney in Fact.

Attest:

.....,

MARY CAWLEY. [49]

#### Selective Branch Office Endorsement

In consideration of the premium charged for this bond, it is hereby agreed that:

1. Anything in this bond to the contrary notwithstanding, the liability of the Underwriter for any loss or losses sustained on account of any instrument covered by this bond made or drawn or purporting to have been made or drawn by or upon the Insured at any office other than its Principal Office, or made or drawn by one acting as agent of the Insured who works out of or is assigned to any office of the Insured other than its Principal Office, shall be limited to the amount set forth opposite such office in the Schedule below, and such amount shall be the limit of the liability of the Underwriter for any such loss or losses resulting from Forgery or Alteration committed by any person or in which such person is concerned or implicated, subject to the provision that, if any such loss or losses are

allocated by the terms hereof to two or more offices, then the limit of liability of the Underwriter as to each such office shall be the amount set forth opposite such office in the Schedule below and the aggregate liability of the Underwriter for all such loss or losses shall not exceed the amount of insurance carried on the Principal Office. The liability of the Underwriter, as set forth herein, shall be a part of and not in addition to the amount of insurance specified in Section 10 of this bond.

2. For all purposes of this bond, the Personal Accounts specifically listed below shall be treated as offices of the Insured and the owners of such Accounts shall be treated as Insured.

## Schedule

Amount of Insurance

Blanket Amount—All offices except the  
Principal Office and those listed below \$

Offices in selective amounts—

## Personal Accounts

\$\$\$  
\$\$\$  
\$\$\$  
\$\$\$  
\$\$\$  
\$\$\$  
\$\$\$  
\$\$\$

3. This bond shall be subject to all of its agreements, limitations and conditions except as herein expressly modified.

4. This endorsement shall become effective as of the time this bond is effective.

Signed, sealed and dated the...day of.....,  
19.....

SEABOARD SURETY  
COMPANY,

By .....  
Attorney-in-Fact.

Affidavit of Mailing attached.

[Endorsed]: Filed September 6, 1957. [50]

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[Title of District Court and Cause.]

### ORDER

Defendant has moved the court to dismiss (1) on the ground that under the provisions of Section 1406, Title 28, U.S.C. the action is filed in the wrong division, and (2) because the complaint fails to state claim upon which relief can be granted; or, in the event the action is not dismissed, (3) to transfer the action to the Helena Division, and (4) to require the joinder of Seaboard Surety Company as a party

plaintiff. Plaintiff has filed a motion for summary judgment.

Counsel have submitted briefs and oral argument. It is my conclusion that the motion to dismiss should be denied and that the action should be transferred to the Helena Division, for the reasons set forth in the Memorandum filed with this Order.

It Is Hereby Ordered that the defendant's motion to dismiss be, and the same hereby is denied, and the defendant's motion to transfer the action to the Helena Division be, and the same hereby is granted.

It Is Further Ordered that the Clerk of this Court be, and he hereby is directed to transmit the file in this action forthwith to the Helena Division of the above entitled court.

It Is Further Ordered that the Clerk of this Court forthwith notify the attorneys of record for the respective parties of the making of this Order.

Done and dated this 3rd day of October, 1957.

/s/ W. J. JAMESON,  
United States District Judge.

[Endorsed]: Filed October 3, 1957. [53]

In the United States District Court for the District  
of Montana, Helena Division

No. 758

MCNEIL CONSTRUCTION COMPANY, a Corpo-  
ration,

Plaintiff,

vs.

THE LIVINGSTON STATE BANK, a Corpo-  
ration,

Defendant.

### ORDER

Plaintiff depositor sues to recover the sum of \$4148.16 from the defendant bank which paid said sum out of the plaintiff's account upon forged checks.

Defendant filed a motion to dismiss upon the ground that the said action was filed in the wrong division, a motion to dismiss the action upon the ground the complaint failed to state a claim upon which relief could be granted, a motion to transfer said action to the Helena Division of said court in the event the motion to dismiss on the ground the action was filed in the wrong division was denied, and a motion to require the joinder of Seaboard Surety Company as a party plaintiff in said cause. Thereafter the plaintiff filed a motion for summary judgment. Defendant's motions to dismiss were denied, its motion to transfer the cause to the Helena



Division of the court was granted; and defendant's motion to require the joinder of Seaboard Surety Company as a party plaintiff and plaintiff's motion for summary judgment are now before the Court for decision. Both parties have filed affidavits in support of their respective motions and in opposition to the motion of the other party.

From the complaint and affidavits it appears that the plaintiff McNeil Construction Company was engaged in a project in Yellowstone National Park and had in its employ as a night watchman one Lex Lamb, and that the said Lamb stole from the plaintiff 400 blank payroll checks and thereafter said Lamb forged the plaintiff's name to 29 of the checks, each of which he made payable to himself [54] in the amount of \$143.04, and each of which checks purported to cover the pay period ending either 9-26-56 or 9-25-56. Thereafter said Lamb cashed said forged checks at various places and they eventually reached the defendant bank and were paid by the defendant and charged against the account of plaintiff.

It further appears that the plaintiff McNeil Construction Company was insured against such loss by an indemnity bond issued by Seaboard Surety Company, and presented a "Statement of Claim" to said surety company under said bond for \$4148.-16, the amount of the forged checks, and received said amount from said surety company and executed an instrument entitled "Loan Receipt" which contained the following statement:

“Received from the Seaboard Surety Company (hereinafter referred to as “Company”) the sum of Four Thousand One Hundred Forty Eight Dollars and Sixteen Cents (\$4,148.16) Dollars as a loan, without interest, repayable only in the event and to the extent of any net recovery the undersigned may make from any person, persons, corporation or corporations, or other parties, causing or liable for the loss or damage described in the attached “Statement of Claim” incorporated herein, by reference or from any insurance, and as security for such repayment the undersigned hereby pledges to the said Company all of his, its or their claim or claims against said person, persons, corporation or corporations or other parties, or from any insurance carrier or carriers.”

The defendant contends that the money received by plaintiff is in fact “payment” under the provisions of its indemnity bond rather than a “loan” as it purports to be under the above loan receipt, and that therefore Seaboard Surety Company having paid the loss suffered by plaintiff is the real party in interest and should be brought into the suit as a party plaintiff. Plaintiff, on the other hand, maintains that the money received by the plaintiff from the surety company is in fact a loan and that the plaintiff therefore has not been paid for the loss occasioned by the forgeries, is the proper party plaintiff, and is entitled to summary judgment against the bank on the bank’s contract not to pay

out money from the account of plaintiff on any except a genuine signature. [55]

The first question to be decided is whether the money which was received by the plaintiff from the surety company constitutes a payment by the surety company of its obligation under the indemnity bond, or is merely a loan.

In the case of *Luckenbach vs. W. J. McCahan Sugar Refining Company*, 248 U. S. 139, the Supreme Court of the United States considered a somewhat similar transaction and upheld the validity of the so-called loan agreement. Since the decision in that case, loan receipt transactions have been considered by many courts and there is a definite conflict in the authorities as to whether as a matter of law such transactions constitute a loan or a payment of the surety's obligation under its bond.

Defendant contends that since the money was received by McNeil Construction Company and the loan receipt agreement was executed in California, California law should control, and that therefor under the case of *American Alliance Insurance Company vs. Capital National Bank*, 171 Pac. (2d) 449, the money was received by McNeil Construction Company from Seaboard Surety Company as a payment rather than as a loan. The so-called loan receipt transaction has not been considered by the Supreme Court of Montana and the plaintiff insists that because the transaction, which gave rise to the loan receipt agreement, occurred in the State of Montana, Montana law would govern, and this being

a diversity case that this Court should decide that if the question were presented to the Montana Supreme Court, it would uphold the loan receipt transaction as a loan.

In the view that the Court takes, it is unimportant whether California law or Montana law applies because the Court believes if the question were presented to the Montana Supreme Court it would follow the same reasoning that the California court adopted, and hold the transaction constituted "payment" rather than a "loan".

As previously noted, there is a conflict of authority on the question of whether or not moneys paid under loan receipt agreements constitute payments of the surety's obligation or merely a loan. Perhaps the majority of the cases uphold such payments as a loan, but they do so, however, in reliance on the *Luckenbach vs. [56] W. J. McCahan Sugar Refining Company* case, *supra*. The *Luckenbach* case is clearly distinguishable from the instant case. In the *Luckenbach* case the insurance company's liability was contingent upon the non-liability of the carrier, whereas Seaboard Surety Company's liability in the instant case is absolute under its bond. In other words, in the *Luckenbach* case, the insurance company was not obligated to pay until it was first established that the carrier was not liable for the damages. The insurance company advanced the amount of the loss as a loan in consideration of the owner of the cargo turning over to it the direction and control of the owner's suit to establish the carrier's liability. The



Court upheld the arrangement as a proper one to protect the insurance company's interest in the suit to establish the carrier's liability and to insure prompt payment to the insured of the loss.

In this case, however, a different situation prevails. As the Court said in the case of *Yezek vs. Delaware L. & W. Ry. Co.*, 176 Misc. 553, 28 N.Y.S. (2d) 35, which is quoted with approval in *American Alliance Insurance Company vs. Capital National Bank*, *supra*:

“The insurer's liability to the insured is absolute when the loss occurs. No shipper or other third party is involved. The insured is entitled to prompt payment without resort to a loan. The transaction is held to be a payment. \* \* \* It was ‘payment without regard to its form’. The so-called loan was a fiction, a subterfuge unnecessary either to protect the insurer or to secure prompt payment to the insured.”

What the New York Court said in the quotation above applies equally in the case at bar.

The Luckenbach case also held that whether such a transaction constitutes a payment or a loan is a matter of intention of the parties. In this case, the only evidence of the parties' intention to engage in a loan transaction is the loan receipt. On the other hand, the evidence is that the money was paid by Seaboard to McNeil in the exact amount of McNeil's loss and was paid in response to a claim filed



by McNeil under the surety bond, the terms of which required Seaboard to pay McNeil the amount of the loss rather than make McNeil a loan. No interest was charged and the so-called loan was repayable only in the event and to the extent of any net recovery [57] which McNeil might make against third parties. Certainly McNeil does not consider itself a debtor to Seaboard as a result of the so-called loan, nor would Seaboard, in a suit by McNeil under the bond, hesitate to claim the so-called loan as a discharge of its obligation under the bond. Viewing the so-called loan transaction in the light of all of the evidence from which the true intention of the parties can be gleaned, the Court feels that the Montana Supreme Court would have little difficulty in holding that the money paid McNeil by Seaboard constituted "payment" of its obligation under the surety bond, and not a "loan," and this Court so holds.

Having been made whole by the payment of its loss by the surety company, under the provisions of Rule 17(a) of the Federal Rules of Civil Procedure and the case of *U. S. vs. Aetna Cas. & Sur. Co.*, 388 U. S. 366, McNeil Construction Company is not the proper plaintiff in this action, not being the real party in interest. It is equally clear under the doctrine of *U. S. vs. Aetna*, *supra*, that Seaboard Surety Company, having paid the loss is the real party in interest, if in the circumstances of the case, it is entitled to be subrogated to McNeil's claim against the bank.

The case of *Meyers vs. Bank of American Nat. Trust & Savings Assn.*, 77 Pac. (2d) 1087, contains a thorough discussion of the problem of when a surety, who had paid a loss under a fidelity bond, is entitled to the benefit of subrogation, and an exhaustive analysis of the cases dealing with that subject. That case points out that a surety's right to recover by way of subrogation from a third person does not stand on the same footing as its right to recover from its principal; as to the latter, that right is absolute, as to the former it is conditional. It further points out that the doctrine of subrogation has with almost unanimity been held not to apply in favor of a surety on a fidelity bond, except only as against persons who participated in the wrongful act of the wrongdoer. The ultimate holding in *Meyers vs. Bank of America* is that in a case such as the one at bar, the surety who has paid the loss has no right by way of subrogation to proceed against the bank unless there are facts from which it appears that in equity and good conscience the bank [58] rather than the surety should stand the loss. This holding is supported by the great weight of authority, and what is more important here, this being a diversity case, it is the law in Montana as announced in *American Bonding Co. vs. State Savings Bank*, 47 Mont. 332, 133 Pac. 367.

Therefore, Seaboard Surety Company's right to maintain an action against the defendant bank under the doctrine of subrogation depends upon the

existence of equities in its favor outweighing those in favor of the bank. The possibility that such equities may exist is suggested by evidence before the Court in the affidavits which might tend to show negligence on the bank's part in cashing and charging to McNeil's account 29 purported payroll checks payable to the same individual for the same payroll period. The Court is not now concerned with the questions of whether the bank's action in this respect amounted to negligence, and, if so, whether such negligence would constitute a sufficient equity in favor of Seaboard to entitle it to maintain an action against the bank under the doctrine of subrogation, however, because the complaint in this case contains no allegations of such negligence or of any other equities that might exist in Seaboard's favor. It is the action commenced by the complaint presently on file with which the Court is concerned, and from what has been said, it is apparent that Seaboard Surety Company is not the proper party plaintiff to that action, or otherwise stated, that the present complaint does not contain sufficient allegations to state a claim upon which Seaboard can recover. While Rules 19 and 21 of the Federal Rules of Civil Procedure authorize the Court to require the joinder of an indispensable party plaintiff in an action pending before it, they do not authorize the Court to require the joinder of a party in an action where the complaint does not state a claim upon which such party can possibly recover, and therefore defendant's motion to require the

joinder of Seaboard Surety Company as a party plaintiff is denied.

From what has been said above, it is clear that McNeil Construction Company's motion for summary judgment must also be [59] denied. As a matter of fact, summary judgment for the defendant should be ordered, because the plaintiff is not the proper party plaintiff to the claim stated in the complaint and cannot recover thereon in its own behalf. It has been suggested, however, that McNeil may still be entitled to maintain this action in its own name as a "trustee of an express trust" under the authority of *Dixey vs. Federal Compress & Warehouse Co.*, 132 Fed. (2d) 275 (by virtue of the following provisions found in the so-called loan receipt:

"And the undersigned (McNeil Construction Co.) covenants and agrees to co-operate fully with the said Company to permit it, at its own expense, to promptly present claim, and, if necessary, to likewise permit it at its own expense to commence, enter into and prosecute suit in the undersigned name against each person or persons, corporation or corporations, or other parties, through whose negligence or other fault the aforesaid loss was caused, or who may otherwise be responsible therefor, with all due diligence, in his, its or their own name."

Assuming, without deciding, that that is so, the present complaint is still insufficient. If McNeil is



bringing the action as a trustee of an express trust under the loan receipt, it is Seaboard's Surety Company's action that it is bringing, and as pointed out above under the *Meyers vs. Bank of America*, *supra*, and *American Bonding Co. vs. State Savings Bank*, *supra*, cases, a necessary part of Seaboard's action, if any, is allegations and proof of equities in favor of Seaboard outweighing those in favor of the defendant bank, and the complaint is devoid of such allegations.

Therefore, because from everything that is before the Court it appears that there may be equities in favor of Seaboard which would entitle it to recover, and because McNeil has suggested the possibility that it should be permitted to make the recovery on behalf of Seaboard as a trustee of an express trust, and in the interests of justice, McNeil Construction Company is granted 20 days within which to file an amended complaint, otherwise summary judgment will be ordered for defendant.

Done and dated this 4th day of December, 1957.

/s/ W. D. MURRAY,

United States District Judge.

[Endorsed]: Filed December 4, 1957.

Entered December 6, 1957. [60]



[Title of District Court and Cause.]

## AMENDED COMPLAINT

Plaintiff above named for its amended complaint herein respectfully alleges as follows:

### I.

That at all times herein mentioned the plaintiff, McNeil Construction Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of California; that the defendant, Livingston State Bank, at all times herein mentioned was and now is a corporation organized and existing under and by virtue of the laws of the State of Montana; that the matter in controversy exceeds \$3,000.00 exclusive of interest and costs.

### II.

That the defendant is a banking corporation organized and existing as aforesaid, and that it is engaged in the banking business and accepts deposits from individuals and from corporations and authorizes such individuals and corporations to draw checks on accounts maintained by such individuals and corporations in its aforesaid bank, which is located in the City of Livingston, Park County, Montana.

### III.

That at all times herein mentioned the plaintiff, McNeil Construction Co., was engaged, among other things, in the general construction business, and during the summer and fall of [61] 1956 was

engaged in construction work in Yellowstone National Park, Wyoming, and that it maintained in the Livingston State Bank as aforesaid a bank account in excess of \$5,000.00 for the purpose, among other things, of drawing checks thereon to be issued to employees for work, labor and services performed by employees of said McNeil Construction Company.

#### IV.

That between September 13, 1956, and September 28, 1956, inclusive, the plaintiff employed one Lex Lamb as a night watchman on the project or work being done by it in Yellowstone National Park as aforesaid, and that unknown to the plaintiff and in September, 1956, said Lex Lamb stole from the plaintiff 400 blank payroll checks numbered 8401 to 8800, inclusive, from the offices maintained by the plaintiff, McNeil Construction Company, in Yellowstone National Park, Wyoming.

#### V.

That on or about September 26, 1956, said Lex Lamb forged the plaintiff's name to 29 of the checks stolen by him as aforesaid, each in the sum of \$143.04, each payable to Lexington Lamb or Lex Lamb, each for the same payroll period, and he cashed the same, and which checks were negligently paid by the defendant, Livingston State Bank, within a period of 15 days, in the total sum of \$4,148.16, from funds on deposit with the Livingston State Bank, and which deposit was made by the plaintiff, McNeil Construction Company, and that

said Livingston State Bank was advised of the theft of said 400 payroll checks and the forgery of 29 thereof by said Lex Lamb on or about October 26, 1956, which was within 30 days after the discovery by the plaintiff of the forgery of these checks and the receipt of the plaintiff of vouchers showing said payment.

#### VI.

That the defendant refuses to refund to plaintiff said [62] sum of \$4,148.16, which is due and owing to the plaintiff from the defendant.

#### VII.

That at all times herein mentioned plaintiff maintained a blanket position bond with Seaboard Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and that attached hereto as Exhibit A and made a part hereof as if set forth in full is a photostatic copy of said blanket position bond; that after defendant and its indemnity company declined to reimburse McNeil Construction Company for the loss hereinabove referred to, plaintiff applied to Seaboard Surety Company for reimbursement of said \$4,148.16, and that thereupon Seaboard Surety Company paid to the plaintiff said sum under a loan receipt agreement, a copy of which is attached hereto as Exhibit B and made a part hereof as if set forth in full, and that this action is brought by plaintiff not only on its own behalf, but as trustee of an express trust under the provisions of Exhibit B.

Wherefore, plaintiff demands judgment against the defendant in the total sum of \$4,148.16 with interest thereon at the rate of 6 per cent from the 1st day of November, 1956, together with the costs and disbursements of this action.

BROWN, SANDE, SYMMES &  
FORBES,

By /s/ WEYMOUTH D. SYMMES,  
Attorneys for Plaintiff.

[Endorsed]: Filed December 9, 1957. [63]

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[Title of District Court and Cause.]

### MOTION AND NOTICE

Comes now the defendant and moves the Court as follows:

1. To dismiss the action because the Amended Complaint fails to state a claim against the defendant upon which relief can be granted.

2. In the event said action is not dismissed, to require the joinder of Seaboard Surety Company as a party plaintiff in said cause, and to summons said Seaboard Surety Company to appear in said action, pursuant to the provisions of Rules 19 and 21, Federal Rules of Civil Procedure, on the ground that the Amended Complaint shows on its face that said Seaboard Surety Company is the real party in interest and a necessary party plaintiff in said cause.

3. In the event said action is not dismissed, to strike from the Amended Complaint on file herein the words "and its indemnity company," appearing in paragraph VII thereof, on the ground that such matter is an improper allegation, evidence of which would be incompetent, and on the further ground that such matter is redundant and immaterial.

Dated this 18th day of December, 1957.

LUXAN & SCRIBNER,

/s/ A. W. SCRIBNER,

Attorneys for Defendant.

[Endorsed]: Filed December 19, 1957. [69]

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In the United States District Court for the  
District of Montana, Helena Division

No. 758

McNEIL CONSTRUCTION COMPANY, a Corporation,

Plaintiff,

vs.

THE LIVINGSTON STATE BANK, a Corporation,

Defendant.

### ORDER

Pursuant to permission granted in the Court's order of December 4, 1957, in this cause, plaintiff has filed an amended complaint in which it attempts



to state a cause of action by it as trustee of an express trust in favor of Seaboard Surety Company. Defendant has filed a motion to dismiss the amended complaint for failure to state a claim, and in the alternative a motion to require the joinder of Seaboard Surety Company as a party plaintiff, and an alternative motion to strike certain allegations from the amended complaint. Said motions were set for hearing, argument was had and briefs in support of and in opposition to said motions have been filed by the parties and said arguments and briefs have been considered by the Court.

The Court is of the opinion that the amended complaint does not state a claim upon which relief can be granted to McNeil Construction Company as trustee of an express trust for Seaboard Surety Company.

The Court is further of the opinion that the provision of the loan receipt agreement, which McNeil Construction Company contends makes it a trustee of an express trust for Seaboard Surety Company, does not have that effect. Therefore, not only does the amended complaint fail to state a claim upon which relief can be granted to McNeil Construction Company upon the theory of an express trust, but it is also impossible for McNeil Construction [71] Company to state such a claim because the loan receipt agreement does not constitute McNeil an express trustee for Seaboard.

For the foregoing reasons, It Is Ordered and this does order that the motion to dismiss the amended

complaint be granted, and said amended complaint is hereby ordered dismissed.

It Is Further Ordered that the Clerk of this court forthwith notify the attorneys of record for the respective parties of the making of this order.

Done and dated this 10th day of April, 1958.

/s/ W. D. MURRAY,

United States District Judge.

[Endorsed]: Filed April 10, 1953.

Entered April 11, 1958. [72]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

To: Defendant, The Livingston State Bank, a Corporation, and to Luxan & Scribner, Attorneys for Said Defendant, P. O. Box 1144, Helena, Montana:

Sirs:

Notice Is Hereby Given, that plaintiff, McNeil Construction Company, a corporation, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the Honorable W. D. Murray, United States District Judge for the District of Montana, dated April 10, 1958, dismissing the Amended Complaint herein and which finally determined this action, and which was en-

tered in this action on April 10, 1958, and from each and every interlocutory order reviewable by the Court of Appeals which was entered prior to the entry of the final Order hereinabove more specifically referred to.

Dated this 7th day of May, 1958.

BROWN, SANDE, SYMMES &  
FORBES,

/s/ WEYMOUTH D. SYMMES,  
Attorneys for the Plaintiff.

[Endorsed]: Filed May 9, 1958. [73]

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
District of Montana—ss.

I, Dean O. Wood, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers are the originals filed in Case No. 758, McNeil Construction Company, a corporation, Plaintiff, vs. The Livingston State Bank, a corporation, Defendant, as designated by the parties as the record on appeal in said cause, except Plaintiff's Exhibit No. 1, consisting of Twenty-eight (28) cancelled checks which are here transmitted separately.

I further certify that on May 21, 1958, I mailed a true copy of plaintiff's Notice of Appeal in said cause to each of the attorneys of record for the defendants at their respective residences, and that the fee of Five Dollars (\$5.00) for filing Notice of Appeal was paid on the date of the filing of said Notice of Appeal.

Witness my hand and the seal of said Court at Helena, Montana, this 5th day of June, 1958.

[Seal]                      DEAN O. WOOD,  
Clerk as Aforesaid.

By /s/ ETHEL FLEMING,  
Deputy Clerk. [80]

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[Endorsed]: No. 16050. United States Court of Appeals for the Ninth Circuit. McNeil Construction Company, a Corporation, Appellant, vs. The Livingston State Bank, a Corporation, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Montana.

Filed: June 9, 1958.

Docketed: June 17, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 16050

McNEIL CONSTRUCTION COMPANY, a Corporation,

Appellant,

vs.

THE LIVINGSTON STATE BANK, a Corporation,

Appellee.

APPELLANT'S STATEMENTS OF POINTS  
ON WHICH IT INTENDS TO RELY

Pursuant to Rule 17 (6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, the plaintiff and appellant in the above-entitled action specifies its points on which it intends to rely on as follows:

1. The District Court erred in denying plaintiff and appellant's Motion for Summary Judgment.
2. The District Court erred in dismissing the original Complaint filed herein by the plaintiff and appellant with leave to the plaintiff to amend.
3. The District Court erred in dismissing the Amended Complaint herein on motion of the defendant and appellee.



Dated this 16th day of June, 1958.

BROWN, SANDE, SYMMES &  
FORBES,

By /s/ WEYMOUTH D. SYMMES,  
Attorneys for Appellant.

Affidavit of mailing attached.

[Endorsed]: Filed June 17, 1958.

